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No. 86-1578

Supreme Court, U.S.  
**FILED**

**MAY 28 1987**

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**In The  
Supreme Court of the United States**

—◇—  
**October Term, 1986**  
—◇—

**JAMES BURKE,**  
by and through his next Friend, Betty Draves,  
*Petitioner,*  
v.

**GENERAL MOTORS CORPORATION,  
INTERNATIONAL UNION, UNITED AUTOMOBILE,  
AEROSPACE AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA and UAW LOCAL 652,**  
*Respondents.*

—◇—  
**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**UAW RESPONDENT'S  
BRIEF IN OPPOSITION**

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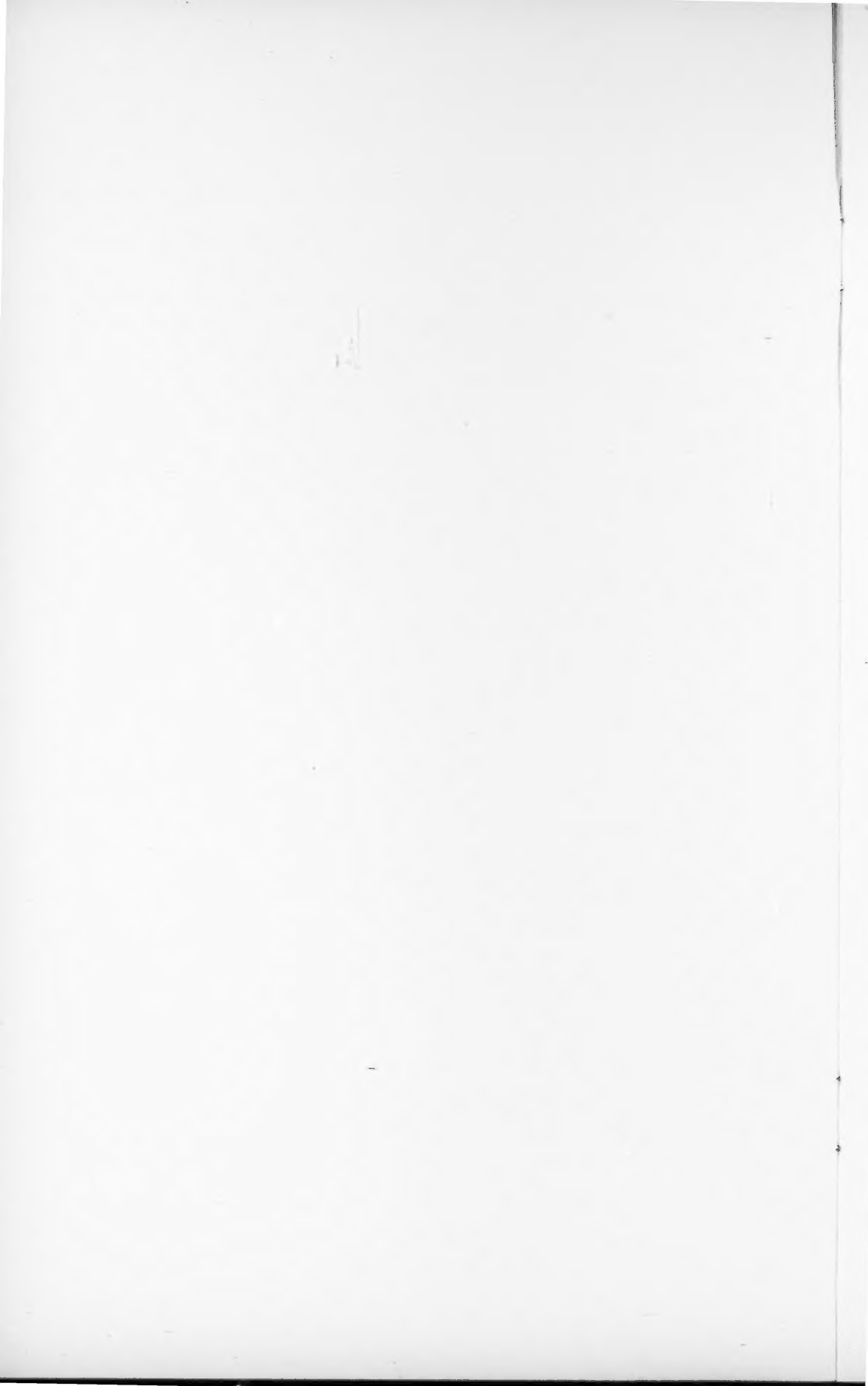
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## **COUNTER-STATEMENT OF THE ISSUE**

**DOES A UNION VIOLATE ITS DUTY TO FAIRLY REPRESENT A MEMBER WHEN THE UNION MAKES A GOOD FAITH DETERMINATION NOT TO DEFEND THE MEMBER'S CONDUCT — BRINGING A SHOTGUN ONTO COMPANY PROPERTY AND SHOOTING A CO-WORKER — ON THE GROUND OF MENTAL ILLNESS?**



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**COUNTER-STATEMENT OF THE CASE**

Petitioner James Burke was employed by Respondent General Motors Corporation and represented for purposes of collective bargaining by Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 652 (hereafter collectively "Union" or "UAW").

On April 16, 1982, Petitioner shot and injured a co-worker in the parking lot of General Motors' Oldsmobile plant in Lansing, Michigan. App. B-3. Police officers responding to the incident shot and wounded Petitioner.<sup>1</sup> *Id.*

On June 11, 1982, after Petitioner had recovered from his wounds, General Motors put Petitioner on "indefinite suspension." On that same day, Respondent UAW filed a grievance on Petitioner's behalf protesting his suspension. On July 14, Petitioner was discharged for violating the General Motors work rule against bringing weapons onto Company property.

The Local UAW officials responsible for Petitioner's district accompanied two General Motors supervisory employees on a visit to Petitioner at the Ingham County Jail shortly after the incident. Petitioner was informed by the General Motors officials at that time of his suspension. The UAW official spoke to Petitioner at that time and obtained his signature on a grievance form as required by the UAW/GM contract.<sup>2</sup>

The UAW official then presented and defended Petitioner's grievance at the first step in the contractual grievance procedure. General Motors denied Petitioner's grievance at Step One. The grievance was then turned over to the shop committeeperson, a union official with

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<sup>1</sup> Petitioner was tried on criminal charges of assault with intent to murder and was found not guilty by reason of insanity. As a result of these criminal charges, Petitioner was committed to a Center of Forensic Psychiatry and was ultimately institutionalized for nearly two and one-half years. *Id.* at B-3.

<sup>2</sup> As Petitioner noted below, the grievance form was not yet filled in when signed by Petitioner. As the District Court found, however, there is nothing untoward about this fact; the language on grievance forms is formulaic and such forms are often signed following the initial discussion with the union representative but prior to their actually being filled out. App. B-6.



jurisdiction over Step Two of the contractual grievance procedure. The shop committeeperson discussed the grievance with the chair of the Shop Committee and with officials of the International Union's General Motors Department, individuals charged with providing interpretations of the national UAW/GM collective bargaining agreement. App. B-4. Following these discussions, the district committeeperson concluded that, "as long as General Motors had proof that [Petitioner] was seen with the gun [on General Motors' property], the discharge would be upheld." App. B-5. Because there was no doubt that such proof was available, the district committeeperson recommended to the Shop Committee that the grievance "be withdrawn because it was unwinnable." App. B-4. The Committee accepted this recommendation and the grievance was withdrawn on July 30, 1982.

The Union notified Petitioner's wife of the decision to withdraw Petitioner's grievance in August of 1982.<sup>3</sup> In 1984, Petitioner filed his Complaint.

Petitioner's Complaint alleged that his suspension and discharge were in violation of the collective bargaining agreement,<sup>4</sup> that the Union failed to fairly represent Petitioner in the grievance procedure, and that both General Motors and the Union had discriminated against Petitioner on the basis of handicap. Petitioner argued

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<sup>3</sup> Petitioner argued below that the failure to notify him personally of the decision to withdraw the grievance was a violation of the Union's duty of fair representation. As the District Court explicitly found, however, the Union presented uncontradicted testimony that it did not know where Petitioner was being held at the time the Committee decided to withdraw the grievance. Given the circumstances, the District Court concluded that the Union adequately discharged its duty by notifying Petitioner's wife.

<sup>4</sup> The collective bargaining agreement allows discharge only for "just cause."

primarily that his mental illness excused his violation of the General Motors work rule prohibiting firearms on Company property and that the Union breached its duty to Petitioner by not attempting to defend his conduct on the basis of his mental condition.

Following discovery, the Union and General Motors moved for summary judgment on several grounds.<sup>5</sup> The District Court granted the motions. The Court found that Petitioner had failed to introduce any evidence demonstrating arbitrary, discriminatory or bad faith conduct on the part of the Union, and had therefore failed to state a claim for breach of the duty of fair representation. The Court therefore also dismissed the breach of contract claim against GM under *Vaca v. Sipes*, 386 U.S. 171, 184 (1967) and *Republic Steel v. Maddox*, 379 U.S. 650 (1956).<sup>6</sup> Having dismissed all of Petitioner's federal law claims, the District Court found that it was unable to exercise pendent jurisdiction over Petitioner's remaining state law handicap discrimination counts. App. B-9.

In a short *per curiam* opinion, the Sixth Circuit affirmed the District Court's decision in all respects. App. A-1.

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<sup>5</sup> Both the Union and General Motors argued that dismissal was required because Petitioner's Complaint was time-barred, because Petitioner had failed to exhaust his internal union avenues of appeal, and because Petitioner had failed to state a claim under the duty of fair representation, among other defenses.

<sup>6</sup> The District Court also dismissed Petitioner's claim under the Federal Rehabilitation Act because of Petitioner's failure to exhaust his administrative remedies. App. B-8.

## REASONS FOR DENYING THE WRIT

Petitioner has presented a single issue for review: whether a union breaches its duty of fair representation by failing to pursue a grievance in which the only conceivable defense is that the employee's mental illness should excuse his bringing a weapon onto Company property and shooting a fellow employee. The Local Union, after consulting with representatives of the International Union responsible for providing interpretations of the national GM/UAW agreement, concluded that Petitioner's grievance was "unwinnable" and therefore decided to withdraw the grievance. Petitioner alleged no specific facts evidencing an arbitrary, hostile, or discriminatory motive on the part of the Union. As we will show in Part I, the Court below was correct in concluding that the Union acted well within the range of its discretion in deciding to withdraw Petitioner's grievance. Moreover, as we show in Part II, there is no conflict of lower court authority on this topic. In sum, nothing presented by this case requires review by this Court.

### I.

#### THE UNION DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION.

The scope of the duty of fair representation is by now well-established. As the Court stated in *Vaca v. Sipes*, 386 U.S. 170, 171 (1967):

A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

In *Vaca*, the Court also reaffirmed the principle that an individual employee does not have an absolute right to

have his grievance taken to arbitration. *Vaca v. Sipes*, 191. Rather, in administering the grievance and arbitration machinery, a union is required to make decisions as to the merits of particular grievances and how to pursue them. As the Court in *Vaca* recognized, the union's discretion in making these determinations is limited only by its duty to administer the grievance machinery without conduct which is either arbitrary, discriminatory or in bad faith.

In the present case, Petitioner violated General Motors' rule against bringing weapons onto Company property. No evidence was presented that General Motors has ever allowed exceptions to this rule or that the rule is anything but universally applied.

After consulting with union officials responsible for administration of the national UAW/GM Agreement, the shop committeeperson at Petitioner's plant concluded that Petitioner's grievance was "unwinnable" and therefore recommended withdrawal of the grievance. Petitioner's union representatives — by then well aware of Petitioner's mental condition — simply concluded, in the good faith exercise of their judgment, that a mental illness defense would not render Petitioner's grievance winnable. App. B-3.

Throughout the proceedings below, Petitioner introduced *no evidence* that the decision to withdraw his grievance was for any reason other than the Union's good faith judgment that insanity would not create an exception to the work rule at issue. The failure to raise insanity as a defense to a violation of the employer's rule against weapons on Company property is not "arbitrary, discriminatory, or bad faith handling" of a grievance. Instead, the Union's decision not to pursue such

an argument is clearly within the Union's discretion under *Vaca*.<sup>7</sup>

Even putting aside the merit — or lack thereof — of the mental illness defense which Petitioner believes should have been raised during the course of his grievance, a union's failure to raise a particular argument in pursuing a grievance does not, without more, rise to the level of a breach of the duty of fair representation. Without evidence that failure to raise such an argument was based on a hostile, discriminatory or bad faith motive, such failure amounts to merely negligent conduct. As the Court below found, "[m]ere negligence is insufficient to establish a breach of the duty of fair representation." [Citing *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 310-11 (6th Cir. 1975)] Further, as the District Court explicitly noted, "a decision to rely on one theory of the case as opposed to another is not arbitrary." [Citing *Poole v. Budd Co.*, 706 F.2d 181, 184 (6th Cir. 1983)]

Finally, no breach of the duty is presented by the Union's failure to further investigate Petitioner's mental condition. In making their determination, the union officials *assumed* that Petitioner indeed suffered a debilitating mental condition, but concluded that an insanity defense — even if supported by adequate medical evidence — could simply not prevail.

In sum, as the Courts below properly held, the Union's good faith decision not to raise mental illness as

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<sup>7</sup> Petitioner has argued that his obtaining a verdict of "not guilty by reason of insanity" on the criminal charges filed as a result of this incident demonstrates the validity of his position and the merit of his grievance. Obviously, General Motors is free to discharge employees even for conduct for which the individual would not be criminally liable because of insanity. Indeed, the suggestion that a contractual "just cause" limitation on discharges should include a *mens rea* requirement or an insanity defense is a novel one.

a defense to a very serious infraction of Company rules — no matter the actual mental state of the grievant — does not constitute a breach of the duty of fair representation.

## II.

### THERE IS NO CONFLICT OF LOWER COURT AUTHORITY ON THE ISSUE PRESENTED HERE.

Petitioner cites no precedent for his claim that the Union breaches its duty of fair representation when it fails to accommodate an alleged mental illness by defending a discharge on that basis. The case referred to by Petitioner as in conflict with the decision below deals with a different situation altogether.

In *Carpenter v. West Virginia Flat Glass*, 763 F.2d 622 (4th Cir. 1985), an employee experienced an on-the-job injury resulting in inability to perform certain work-related tasks. The employee produced a medical report from his personal physician indicating that he could perform no work except "light duty." After the employer indicated that no "light duty" work was available, the employee obtained a "no duty" report from his physician. The employer then asked the employee to submit to an examination by a physician selected by the company. The employer's physician submitted a report which was inconclusive as to the type of work which the employee could perform. The employer, however, interpreted their physician's report to mean that the employee was medically able to perform his duties. When the employee refused, he was discharged by the company.

The union filed and processed a grievance on the employee's behalf. The grievance was resolved by a mutual agreement that a neutral physician would be

established and that both parties would be bound by his or her conclusion. When the neutral physician submitted a medical report mirroring the language of the employer's physician, and similarly inconclusive as to the extent of work which the employee could perform, the union apparently assented to the company's discharge. The court found that the union's failure to request a more definitive report from the neutral physician demonstrated "perfunctory" handling of the grievance to such an extent that it amounted to arbitrary conduct under *Vaca*.

The difference between *Carpenter* and the present case is apparent. In *Carpenter*, the extent of the disability was the crucial issue to be determined in the grievance procedure. By failing to obtain a sufficiently dispositive medical opinion, then, the union breached its duty of fair representation. In the present case, however, the discharge was not based on medical judgment. Instead, the discharge was based on Petitioner's admittedly violating Company rules by bringing a shotgun onto Company premises and shooting a co-employee. The Union concluded that, *whatever* Petitioner's medical condition, such medical condition would not render a grievance over his discharge "winnable." In the present case, therefore, there is no medical dispute to be resolved, and no breach of the duty in the Union's failure to develop a more complete medical picture of Petitioner's mental condition.



**CONCLUSION**

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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